IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1442

DEAN FOODS COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

Petitioner presents its Petition for a Rehearing of this Court's Order dated June 1, 1970, denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and in support thereof, respectfully shows the following:

GROUNDS FOR REHEARING

The reason that the Petition for Certiorari should be reconsidered and reheard is that in the past thirty (30) days another Circuit has spoken on the issue raised. Absolute conflict is now present between the circuits.

Petitioner herein, Dean Foods Company, Inc., filed its Petition for a Writ of Certiorari on April 17, 1970, with the Court. It raised as a fundamental issue, and reason for granting the Writ, that the Decision of the United States Court of Appeals for the Sixth Circuit below remains in conflict with a Decision of the Second Circuit with regard to expedited procedures promulgated by the National Labor Relations Board. Specifically, Petitioner raised the rule enunciated in **Pepsi Cola Bottling Company v. NLRB**, 409 F. 2d 676 (CA—2, 1969).[1]

Under the **Pepsi Cola** decision, the Second Circuit finds that the National Labor Relations Board, the Respondent below herein, must make its own finding of fact before it can conclude a company has committed an unfair labor practice. Simply, **Pepsi Cola**, supra, requires the Board itself to make its own findings and evidentiary appraisal concerning unfair labor practices which will stand independent from those findings of fact and conclusions of law rendered by a "subdelegatee"; more specifically, a Regional Director, or an agent of the Board.

The Petitioner herein has shown how it was afforded synonymous treatment before the Board as was the Employer before the Second Circuit in **Pepsi Cola**. In this respect the National Labor Relations Board, in its argument to the Court below and to its argument before this

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[1] Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, pages 16 through 21.

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Court, has admitted that the Board did not review the evidentiary facts in **Pepsi Cola**, supra. Conversely, it alleged that the Board did review the evidence in this matter. See, Brief in Opposition for the National Labor Relations Board, page 8. However, it is remembered where the Board relates it considered the "entire record of this case" (J. A.-76) that actually the Board considered only, (1) the Trial Examiner's Decision, (2) Exceptions to that Decision, and (3) formal pleadings presented to the Trial Examiner, e. g., a Complaint, Answer, etc. Clearly, it cannot be contested that the Board did not determine, or even observe, facts, evidence, testimony or exhibits; such evidence was not presented to it under expedited procedures utilized herein, and equally so erroneously utilized in the **Pepsi Cola** determination. The Board did not "review"[2] the evidentiary determinations made by the Regional Director during the Representation stage.

Equally so, the Board deferred and refused from reviewing the evidence submitted at the unfair labor practice stage, and therefore evidentiary findings of fact were made by subdelegatees and **not** by the National Labor Relations Board as is statutorially required. See, Section 3 (b) of the Act, 29 U. S. C. A., Section 153 (b), as amended in 1959.

These circumstances and the erroneous treatment afforded to the Petitioner were specifically raised to the Court below (observe, Brief for the Dean Foods Company on Application for Enforcement of an Order of the National Labor Relations Board and Cross Petition to Review and Set Aside said Order, page 25 through page 29.)

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[2] The Board is most specific in disclosing what was "considered" upon "review". The Board adopted, without modification, the subdelegatees' findings after observing only, (1) the Employer's objections, (2) the Regional Director's Report, and (3) the Employer's Exceptions (Appendix E, p. 21).

Although the Petitioner was advised upon oral argument before the Court below that the **Pepsi Cola** decision and rule would be considered in its application to this case, the United States Court of Appeals for the Sixth Circuit in both its Decision and Order offered no comment or judicial finding resolving this issue. The Court was further reminded of its refusal to make this determination by a timely filed Petition for Rehearing on behalf of Dean Foods Company submitted February 20, 1970, pages five through eight. And upon Petitioner again raising the identical circumstances and issue before this Court, it was advised that its Petition for Writ of Certiorari was denied on June 1, 1970.

Nine days before that determination was rendered, the United States Court of Appeals for the First Circuit raised the **Pepsi Cola** rule directly, and upon its judicial analysis, rejected the rule of the Second Circuit. Observe, **NLRB v. Magnesium Casting Co.**, ... F. 2d ..., No. 7462, CA—1, May 21, 1970. It is noted that the United States Court of Appeals for the First Circuit had before this time apparently recognized the rule of **Pepsi Cola.** Observe, Chelsea Clock Co., 411 F. 2d 189, 192 (CA—1, 1969).

Therefore, during the intermediate time in which the Petition for Writ of Certiorari was presented to the Court herein, and subsequent denial rendered in June the United States Court of Appeals for the First Circuit substantially modified its formerly announced position regarding the expedited procedures utilized by the National Labor Relations Board and nine days before Certiorari was denied in this case, it directly rejected the determination of the United States Court of Appeals for the Second Circuit holding in **Pepsi Cola.** The First Circuit in **Magnesium Casting**, supra, reflected the conflicting rule of the Circuits by observing:

> "... there may be some merit to the proposition that discretionary review by the Board is not a sufficient

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guarantee of the exercise of the expertise attributed to the Board; that Section 10 (c) of the Act requires the Board to make its own determination of fact in unfair labor practice cases, see, **Universal Camera Corp. v. Labor Board,** 34 U. S. 474, 492 (1951); and the Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors, Pepsi-Cola Buffola Bottlers, supra, at 681."[3]

However, the First Circuit rejects the fact that there "may be some merit" to the rule of **Pepsi Cola** by apparently finding that Section 3 (b) of the Act delegates certain powers to Regional Directors, and further relying on comments by Senator Goldwater finds legislative intent demonstrating that this expedited procedure of using delegated authority is sufficient. And the First Circuit further suggests that it would be difficult "to see in what respect review of the actual record would have added to the Board's comprehension of the Company's contentions."

It would be redundant to submit that this Petitioner does not agree with any of the forementioned determinations made by the United States Court of Appeals for the First Circuit in **Magnesium Casting.** Specifically, Section 3 (b) of the Act did not delegate fact finding powers to subdelegatees, Regional Directors, under Section 10 of the Act; that dealing with unfair labor practices. Secondly, the remarks of Senator Goldwater cannot in any manner support the conclusion of the First Circuit. Thirdly, Petitioner submits that the only appropriate manner or means in which to review any determination of fact below is to observe **the actual record** (evidence and Exhibits submitted) rather than conclusionary opinion documents or formal pleadings as this Petitioner was so treated.

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[3] Advance sheet prepared and edited by the Bureau of National Affairs, cited as 74 LRRM 2234, 2237.

In this respect, the Petitioner is obviously not alone. The United States Court of Appeals for the Second Circuit does not agree with **Magnesium Casting** either, nor apparently does the United States Court of Appeals for the Fourth Circuit. Observe, **NLRB v. Clemen-Blythe Companys**, 415 F. 2d 78, 82 (CA—4, 1969).

As noted also, the United States Court of Appeals for the Seventh Circuit has confronted itself with the issue of the NLRB's expedited procedures. See, **State Farm Mutual Auto Insurance Co. v. NLRB**, 413 F. 2d 947 (CA—7) (1969), and **NLRB v. Process Corporation**, 412 F. 2d 215, 217-218 (CA—7) (1968). However, in both of these determinations before the Seventh Circuit evidentiary hearings, recorded testimony, exhibits, and evidence were presented for review. In this matter presently before the Court, no hearing was held at any stage of these proceedings,[4] although the company repeatedly requested that such a hearing be afforded to it consistently below.

Therefore, as of this date the United States Court of Appeals for the Second Circuit, and apparently the Fourth Circuit have approved the rule that when Unfair Labor Practices are presented to the Board, the Board itself **must** review the evidentiary issues submitted to it, rather than allowing a "subdelegatee" to make such determinations of fact and law. Conversely, the United States Court of Appeals for the First Circuit, and apparently the Seventh Circuit, disagree with this rule. Thirdly, the United States Court of Appeals for the Sixth Circuit, which rendered adjudication herein, refused to resolve the conflict and refrained from determining the issue as presented to it in any respect, whatsoever.

It is for these reasons and grounds that the Petitioner herein requests rehearing so as to require United States

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[4] All determinations of fact were made on an *ex parte* basis.

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Court of Appeals for the Sixth Circuit upon remand of this matter, to make a cogent analysis of this issue for the benefit of the bar, the judiciary, the Respondent and of course, the Petitioner herein. Or alternatively, that the Court grant certiorari over these parties and resolve the issue of conflict existing among the Circuit, so that a decisive determination be made as to the scope of the National Labor Relations Board's delegatory powers and Constitutional responsibilities of review under Section 3 (b) of the Act.

Can Section 10, powers of the Act be indirectly, although certainly, delegated to subordinate agents of the Board? i. e., the Regional Director's and/or Trial Examiners or must, the Board, itself, observe and determine the facts in unfair labor practice cases? Secondly, does Section 3(b) of the Act allow final disposition of all Section 9 questions when the Regional Director is the only forum of appeal and a party is then required to knowingly invoke Section 10 action to obtain review of such delegated determinations? Such a means of appeal is in itself against public policy! However, review by intentional violation is required to common practice before the National Labor Relations Board: See, **Boire v. Greyhound Corporation,** 376 U. S. 473, 476-477 (1964).

Without reconsideration and rehearing by the Court herein, Petitioner has not been judicially advised whether it is right (**Pepsi Cola**, *supra*) or converesly, wrong (**Magnesium Casting**, *supra*). But none the less, the Petitioner recognizes that equally so neither do the Circuits aforementioned, yet realize the correctness, or not, of their position.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted

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Dated: June 23, 1970

Certificate of Counsel

I, Newell N. Fowler, Counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that, it is restricted to the grounds specified in Rule 58, subdivision 2 of the Rules of this Court.

Newell N. Fowler
Counsel for Petitioner

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